2015

Sean Kendall, Plaintiff/Appellant, v Brett Olsen, Lt. Brian Purvis, Joseph Allen Everett, Tom Edmundson, George S. Pregman and Salt Lake City Corporation, Defendants/Appellees

Utah Court of Appeals

BEFORE THE UTAH COURT OF APPEALS

SEAN KENDALL, Plaintiff/Appellant, v. BRETT OLSEN, LT. BRIAN PURVIS, JOSEPH ALLEN EVERETT, TOM EDMUNDSON, GEORGE S. PREGMAN, and SALT LAKE CITY CORPORATION, Defendants/Appellees.	Appeal No. 2015-0927-CA On Appeal from the Third Judicial District Court District Court Case No. 150900558

BRIEF OF APPELLEE SALT LAKE CITY CORPORATION

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JURISDICTION

This Court has jurisdiction pursuant to Utah Code § 78A-4-103(2)(j) and Utah Code § 78A-3-102(3)(j).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

ISSUE: Are the provisions of Utah Code § 78B-3-104 (the "bond statute") and Utah Code § 63G-7-601 (the "undertaking statute"), which relate to the filing of a bond and an undertaking when bringing an action against a police officer or a government entity, unconstitutional either facially or as applied to Kendall.

Standard of Review: "The issue of whether a statute is constitutional is a question of law, which we review for correctness, giving no deference to the trial court." *Tindley v. Salt Lake City Sch. Dist*., 2005 UT 30, ¶ 11, 116 P.3d 295, 299 (internal quotation and citation omitted).

Preservation: Kendall brought this action to challenge the constitutionality of these statutes both facially and as applied to Kendall. (*See e.g.* R. 00042-60.)

CONSTITUTIONAL OR STATUTORY PROVISIONS

DuCiv. R. 67-1(c) states:

> **(c) Deposit of Required Undertaking or Bond in Civil Actions.**
> In any case involving a civil action against the State of Utah, its officers, or its governmental entities, for which the filing of a written undertaking or cost bond is required by state law as a condition of proceeding with such an action, the clerk of court may accept an undertaking or bond at the time the complaint is filed in an amount not less than $300.00. The court may review, fix, and adjust the amount of the required undertaking or bond as provided by law. The court may dismiss without prejudice any applicable case in which the required undertaking or bond is not timely filed.

Utah Code § 78-11-10 (1953), attached hereto as Aplee. Add. 0001.

See also Utah Code § 78B-3-104 and Utah Code § 63G-7-601, as set forth in Appellant's Brief.

STATEMENT OF CASE

On June 18, 2014, several Salt Lake City police officers were searching for a missing three-year-old boy in the area of Kendall's home. (R. 00043, ¶ 2.) An officer entered the backyard of the home Kendall rents to search for the missing child and encountered Kendall's dog. (R. 00044, ¶¶ 3-4.) The dog was shot after it charged the officer. (R. 00044, ¶ 4.) Shortly thereafter, Kendall filed a notice of claim with the City stating his intent to pursue claims under both federal and state law for the actions the City and its officers took pursuant to the search for the missing child. (R. 00064-77.)

Utah law awards attorney's fees to the prevailing party in cases that assert state law claims against a police officer. Utah Code § 78B-3-104 (the "bond statute"). To ensure a police officer is able to collect at least some of the attorney's fees he or she is entitled to receive, if they prevail, an individual that brings state law claims against a police officer is required to post a bond in an amount determined by the court to cover the attorney's fees and costs that may be awarded. *Id*. The bond is only called on if the police officer prevails and attorney's fees are awarded. Utah law also requires an individual who brings state law claims against a government entity to file an undertaking (of not less than $300), which is used to cover the government entity's costs if the entity prevails and costs are awarded. Utah Code § 63G-7-601 (the "undertaking statute"). The "bond statute" and the "undertaking statute" are sometimes referred to collectively hereinafter as the "statutes."

Because state law claims are often brought together with federal law claims, the United States District Court for the District of Utah adopted a local rule to address the requirements of these statutes. The rule states that when an individual is required by state law to post a bond or an undertaking the clerk may accept a bond or an undertaking in the amount of $300 at the time the complaint is filed. DuCivR. 67-1(c). The rule also provides that the court may "review, fix, and adjust" that amount at a later date. *Id.* Rather than follow the guidance of the local rule and post a $300 bond and a $300 undertaking and pursue his federal and state law claims, Kendall filed this action in the Third District Court challenging the constitutionality of the bond and undertaking statutes. In the alternative, Kendall requested that the district court determine the amount of the bond and the amount of the undertaking Kendall was required to post to pursue his state law claims. Salt Lake City and the various police officers Kendall intended to bring state law claims against were named as defendants (referred to hereinafter as the "City Defendants").

Shortly after filing the complaint, Kendall filed a motion for summary judgment arguing the statutes are facially unconstitutional because they violate the open courts provision, the right to petition government, procedural due process and equal protection. (R. 00185-201.) The court heard oral argument on this issue and also heard testimony regarding Kendall's ability to post a bond to cover attorney's fees and the $300 undertaking. (R. 00621-815.) The district court issued a ruling finding Kendall was required to pay the $300 undertaking, but found that Kendall was impecunious and not required to furnish a bond. (R. 00543-551.)

With respect to Kendall's challenge to the facial constitutionality of the statutes, the district court found Kendall did not have standing to challenge the constitutionality of the statutes because Kendall "admits he can afford the $300 minimum payment contemplated by the undertaking statute" and because the court has found "Kendall is impecunious and no bond must be furnished." (R. 00548-49.) Despite finding Kendall did not have standing to challenge the constitutionality of the statutes the district court went on to find that neither statute violated the open courts provision, the right to petition government, procedural due process, or equal protection, as Kendall alleged. (R. 00548-51.)

Shortly after this decision was issued, Kendall filed an action against Salt Lake City and the police officers named in this action asserting his state law claims and posted the $300 undertaking. That action is currently pending before Judge Shelby in the United State District Court for the District of Utah.[1] Despite not being required to post any bond and admitting he was willing and able to post the $300 undertaking, Kendall brings this appeal challenging the constitutionality of the bond and undertaking statutes, both facially and as applied to Kendall.

[1] Kendall filed that action in Third District Court and the City Defendants removed it to the United States District Court for the District of Utah. *See Kendall v. Olsen, et al.*, Case No. 150907410 and *Kendall v. Olsen*, *et al.,* Case No. 2:15-cv-00862.

STATEMENT OF FACTS

A. Kendall Publicly Raised Funds to Pay for a Lawsuit Against the City and Its Officers.

After the events of June 18, 2014, Kendall engaged an attorney and filed a notice of claim with Salt Lake City stating his intent to bring federal and state law claims against the City and various police officers for the actions they took in response to the report of the missing child. (R. 00064-77.) Kendall claims "at least $1.5M in damages, plus punitive damages, attorney's fees and costs." (R. 00076; R. 00524, ¶ 7.) To fund his litigation, Kendall set up a fund raising page on the website: http://www.gofundme.com/Justice-For-Geist. (R. 00355-356.)[2] Kendall also raised funds through PayPal by selling merchandise such a tee-shirts, coffee mugs, and stickers. (R. 00524, ¶ 10.) As of September 11, 2015, Kendall had raised a total of $23,417.72 on his GoFundMe page and approximately $1,400 through PayPal. (R.00524, ¶¶ 9-11).

B. Kendall Filed the Complaint in this Action Challenging the Constitutionality of the Bond and Undertaking Statutes.

In early 2015, rather than pursue his federal and state law claims against Salt Lake City and its police officers, Kendall filed the complaint in this action challenging the constitutionality of the bond and undertaking statutes. (R. 00042-60.) Kendall requested, in the alternative, that the district court determine the amount of the bond and the amount of the undertaking he would need to file to pursue his state law claims against the City and its police officers. (*Id.*) Shortly after filing the complaint, Kendall served initial

[2] This website is commonly referred to as "GoFundMe" and will be referred to as the "GoFundMe website" hereinafter.

disclosures, which included print outs of his various bank accounts. (R. 00153-157.) Kendall then filed a motion for summary judgment claiming the statutes are facially unconstitutional or, in the alternative, that Kendall was impecunious and that he should not be required to post a bond. (R. 00185-201.) The motion was accompanied by a declaration of Kendall setting forth his assets and liabilities which notably stated he could afford the $300 minimum undertaking. (R. 00243-245.) Conspicuously absent from both the initial disclosures and Kendall's declaration was any reference or accounting for the more than $23,000 Kendall raised on the GoFundMe website. (R. 00153-157; R. 00243-245.)

The City Defendants opposed Kendall's motion for summary judgment arguing the statutes are constitutional and disputed Kendall's claims that he could not afford a bond to cover attorney's fees for his state law claims. Specifically, the City Defendants stated that they believed it would take approximately 100-120 hours to address Kendall's state law claims and, based on the hourly rate for an attorney with the Salt Lake City Attorney's Office, [3] a bond of $12,000 would be sufficient. (R. 00350-52, ¶¶ 7-19.) The City Defendants pointed out Kendall had raised nearly twice that amount on his GoFundMe website and filed a Rule 56(d) motion requesting limited discovery to determine the whereabouts of those funds. (R. 00294-99.)

[3] The Salt Lake City Attorney's Office currently uses a rate of $123.62 per hour. (R. 00350-52, ¶¶ 12-14, R. 00756-57, 133:14-134:8.) That rate is calculated using the formula approved by the Utah Supreme Court as the appropriate method for calculating the hourly rate of in-house counsel for purposes of recovering attorney fees. (*Id*.)

C. The Court Permitted Discovery on the Whereabouts of the Monies Kendall Raised on GoFundMe.

The district court granted the City Defendants' Rule 56(d) motion and scheduled a hearing for September 15, 2015 to hear argument on Kendall's motion for summary judgment. (R. 00460-61.) The City Defendants informed the district court that depending on the information Kendall produced pursuant to the City Defendant's discovery requests, it may be necessary to hold an evidentiary hearing to determine the whereabouts of the $23,000 and whether he was indeed impecunious. (R. 00483-84, R. 00504, ¶¶ 1-3.) Kendall objected to holding an evidentiary hearing. (R. 00500.)

On August 6, 2015, Kendall served his responses to the City Defendants' discovery requests and provided his accounting for the $23,000 he raised on GoFundMe. (R. 00501.) Kendall claimed the majority of the monies raised on the GoFundMe website were used to pay his current counsel's legal bills.[4] (R. 00494, ¶¶ 28-29.) A review of Kendall's legal bills revealed that the vast majority of the legal fees incurred to date were for work to bring claims challenging the constitutionality of the statutes—not to pursue Kendall's claims against the City or its police officers for the events of June 18.[5] (R. 000757-59, 134:9-136:14, R. 00822, City's Ex. A-1.)

[4] Kendall has an agreement with his current counsel where he pays counsel a discounted hourly rate and counsel will recover a percentage of any recovery achieved in the claims against the City Defendants for the actions they took in the search for the missing child. (R. 00494, ¶¶ 28-29, R. 00822, Ex. P. 17.)

[5] Documents showed and Mr. Kittrell testified that as of September 1, 2015 at least $21,064.00 (or 442 billed hours) was for work challenging the constitutionality of the statutes. (R. 000757-59, 134:9-136:14, R. 00822, City's Ex. A-1.)

Having received Kendall's accounting of the money he raised on GoFundMe, the City Defendants proposed proceeding on the declarations filed by the parties and the documents produced in discovery. (R. 00500.) Kendall's counsel did not inform Kendall of the City Defendants' offer to proceed in this manner, which would have saved considerable time and saved Kendall the additional cost and stress of preparing for an evidentiary hearing. (R. 00687-88, 64:17-65:4.) Instead, Kendall's counsel insisted on proceeding with a full evidentiary hearing even though he had initially objected to proceeding in that way. (R. 00500, R, 00504, ¶ 3, R. 00615-815.)

D. The Court Heard Argument on Kendall's Challenge to the Constitutionality of the Statutes and Evidence Regarding Kendall's Impecuniosity and Ability to Furnish a Bond.

On September 15, 2015, the court heard oral argument on Kendall's motion for summary judgment regarding the facial constitutionality of the statutes and held an evidentiary hearing regarding Kendall's financial ability to post the $12,000 bond the City Defendants requested and the $300 undertaking. (R. 00639-777.) Prior to the September 15 hearing the parties stipulated to numerous facts and the admissibility of almost all proposed exhibits. (R. 00523-528.) The evidence Kendall presented at the hearing regarding his assets and liabilities was consistent with, and merely repeated, his declaration and the parties stipulated statement of facts. (R. 00655-85.) On cross examination it was revealed that Kendall could not account for all the funds raised and that he would receive a windfall if he ended up prevailing on his state law claims and recovering attorney's fees because he had no way of reimbursing the people that contributed to GoFundMe to assist in the payment of his legal fees. (R. 00685-708.)

Kendall called two witnesses that repeated the information contained in their declarations regarding the cost of obtaining a bond. (R. 00712-20.) They also testified that if Kendall had $23,000 in cash that would be sufficient collateral for a $12,000 bond.[6] (R. 00715, 92:14-19; R. 00719, 96:4-11.) Kendall also called two attorneys who repeated the testimony they presented in their declarations, testifying that they believed it was impossible to estimate the attorney's fees and costs that would be incurred when representing a party in this action. (R. 00264-71; 00720-51.) On cross examination both witnesses admitted that they regularly represent clients in civil rights cases on a purely contingency-fee basis. (R. 00728-29, 105:23-106:17, R 00740, 117:6-10.) One attorney also admitted that when looking at a contingency-fee case it is necessary to look at the amount of time and money they are going to have to put into the case to decide whether to take that case. (R. 00728-29, 105:23-106:17.)

The City Defendants called one witness, Mark Kittrell, who testified that the City believed at $12,000 bond would be sufficient and the basis for that belief. (R. 00350-52, ¶¶ 8-15, R. 00752-57, 129:20-134:8.)

E. The District Court Upheld the Statutes as Constitutional and Found Kendall Was Impecunious.

The district court issued a memorandum decision upholding the constitutionality of the statutes and requiring Kendall to pay the $300 undertaking as required by the undertaking statute. (R. 00543-52.) Specifically, the district court found that Kendall

[6] Notably, the parties stipulated that rather than obtain a bond from a bonding company, Kendall could satisfy the bond requirement by simply posting cash with the court. (R. 00527, ¶ 43.)

admitted he could afford the $300 undertaking and was required to pay that amount, but found Kendall was impecunious and not required to post a bond pursuant to the bond statute. (R. 00543-52.) The district court further held that Kendall did not have standing to challenge the statutes because he could afford the $300 undertaking and was not required to post a bond. (R. 00548-49.) Despite Kendall's lack of standing, the district court went on to find the statutes do not violate the open courts clause, the right to petition government, due process or equal protection. (R. 00548-51.)

F. Kendall Filed A Complaint Asserting His State Law Claims Against the City Defendants and Appealed the District Court's Ruling that the Statutes Were Constitutional.

Shortly after the district court issued its ruling, Kendall filed a complaint asserting his state law claims against the City Defendants and paid the $300 undertaking required by the undertaking statute. *See Kendall v. Olsen*, case no. 2:15-cv-00862. That action is currently pending before Judge Shelby in the United States District Court for the District of Utah.[7] *Id*. Kendall also appealed the district court's decision in this case that the bond and undertaking statutes are constitutional.

G. Kendall's Motion to Strike the Declaration of Mark Kittrell.[8]

Prior to the summary judgment and evidentiary hearing in this case, Kendall also filed a motion to strike the declaration of Mark Kittrell and to prevent him from testifying

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[7] *See supra* n.1.

[8] Although Kendall identified in his docketing statement his intent to appeal the district court's ruling with respect to the Motion to Strike the Declaration of Mark Kittrell, Kendall's appellate brief contains no argument on this point. However, footnote 10 of his Appellant's Brief refers to the district court allowing testimony from Mr. Kittrell over Kendall's objection. Accordingly, these facts are included to give context to those statements.

on behalf of the City Defendants at the hearing. (R. 00422-33.) Curiously, Kendall argued Rule 3.7 of the Utah Rules of Professional Conduct prevented Mr. Kittrell from submitting a declaration or testifying for the City Defendants, even though the City Defendants were represented by another attorney and would be represented by another attorney at the hearing. (*Id*.) The district court denied Kendall's motion and allowed Mr. Kittrell to testify at the hearing, but held that he was disqualified from continuing to represent the City Defendants in this matter. (R. 00547-48.)

SUMMARY OF ARGUMENT

The Court should decline to hear this appeal because it is moot. Kendall was not required to furnish a bond and was only required to pay a $300 undertaking that he admitted he could afford. He has since filed an action asserting the very claims he alleges the statutes preclude him from filing. A determination that the bond and undertaking statutes are unconstitutional will not afford him any relief. Neither of the exceptions to the mootness doctrine apply.

The Court should decline to hear this appeal for the additional reason that Kendall does not have standing to challenge the constitutionality of the statutes. He was not required to pay a bond and he was not required to pay more than the $300 minimum undertaking that he stated he could afford. He has since filed an action asserting his state law claims against the City Defendants. Thus, a declaration from this Court that the statutes are unconstitutional can redress no alleged constitutional injury. Likewise, alternative standing under the public interest doctrine is not appropriate in this case.

Should the Court decide to reach the merits of this appeal, it should affirm the district court's finding that the statutes are constitutional on their face. First, the statutes do not violate the open courts provision of the Utah Constitution or the right to petition government because they do not abrogate a claim. Moreover, the statutes pass constitutional muster under a *Berry* analysis. Second, the statutes do not violate the due process protections of the Utah and the United States constitutions because the statutes are reasonably related to a proper legislative purpose and satisfy the notice and hearing requirements of a procedural due process analysis. Finally, the statutes do not violate the equal protection provisions of the Utah and United States constitutions because they do not create discriminatory classifications. Moreover, any classifications created by the statutes are reasonably related to a proper legislative purpose. Kendall has not shown otherwise.

Finally, the Court may disregard Kendall's claim that the statutes are unconstitutional as applied to Kendall. The district court found that Kendall was impecunious and not required to post a bond and that Kendall need only pay the minimum $300 undertaking, which Kendall stated he could afford.

ARGUMENT

I. THE COURT SHOULD DECLINE TO RULE ON THE CONSTITUTONALITY OF THE BOND AND UNDERTAKING STATUTES BECAUSE THIS APPEAL IS MOOT.

Kendall's appeal of the district court's ruling regarding the constitutionality of the bond and undertaking statutes is moot. A controversy is moot "when the requested judicial relief cannot affect the rights of the litigants." *Tillotson v. Meerkerk*, 2015 UT

App 142, ¶ 9, 353 P.3d 165, 168. Moreover, courts should refrain from unnecessarily deciding constitutional issues. *Hoyle v. Monson*, 606 P.2d 240, 242 (Utah 1980) ("The right and power of the judiciary to declare whether legislative enactments exceed constitutional limitations is to be exercised with considerable restraint and in conformity with fundamental rules."). In particular, courts should not decide constitutional issues that no longer affect a particular litigant's rights. *Id.* ("One such fundamental rule of long-standing is that unnecessary decisions are to be avoided and that the courts should pass upon the constitutionality of a statute only when such a determination is essential to the decision in a case.").

Here, determining the constitutionality of the bond and undertaking statutes is not necessary because it will not affect Kendall's rights. The district court determined Kendall was impecunious and was not required to post a bond. Likewise, the district court did not require Kendall to pay more than the $300 minimum undertaking that Kendall stated he could afford. Kendall has since filed an action asserting the very claims he alleges the statutes preclude. The Court should refrain from unnecessarily ruling on the constitutionality of the statutes because it will not provide any actual relief to Kendall.

Likewise, while this Court may exercise discretion to decide issues that are technically moot under the exceptions to the mootness doctrine, neither of those exceptions apply here. The collateral consequences exception to the mootness doctrine only applies when "collateral legal consequences may result from an adverse decision." *Matter of Giles*, 657 P.2d 285, 286 (Utah 1982). Kendall can show no adverse legal

consequences from the district court's decision because he has already filed an action asserting the claims he asserts the statutes preclude.

The public interest exception also does not apply. The public interest exception to the mootness doctrine only applies "when the case [1] presents an issue that affects the public interest, [2] is likely to recur, and [3] because of the brief time that any one litigant is affected, is capable of evading review." *Barnett v. Adams*, 2012 UT App 6, ¶ 10, 273 P.3d 378, 382. The constitutionality of the statutes are not likely to "evade review." If the statutes operate, as Kendall claims, to preclude a party from bringing state law claims against a police officer or a government entity, then the party precluded from bringing such claims may bring an action challenging the constitutionality of the statutes. The Court should decline to rule on the merits of this appeal.

II. KENDALL DOES NOT HAVE STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE BOND AND UNDERTAKING STATUTES.

A. Kendall Does Not Have Traditional Standing.

As the district court previously ruled, Kendall does not have traditional standing to challenge the constitutionality of the statutes because the statutes have caused him no injury. To show traditional standing, a party "must show three things: (1) that the party has been or will be adversely affected by the challenged actions, (2) that a causal relationship exists between the injury to the party, the challenged actions and the relief requested, and (3) that the relief requested is substantially likely to redress the injury claimed." *State v. Roberts*, 2015 UT 24, ¶ 46, 345 P.3d 1226, 1240 (internal quotation and citation omitted).

Traditional standing requires that the constitutionality of a statute is viewed from the perspective of the party raising the challenge. *See, e.g., Hoyle*, 606 P.2d at 242 ("A constitutional question does not arise merely because it is raised and a decision is sought thereon; rather, the constitutionality of a statute is to be considered in the light of the standing of the one who seeks to raise the question and of its particular application"); *Roberts*, 2015 UT 24, ¶¶ 46-47 ("Standing requires that we view the constitutionality of a statute from the perspective of the party raising the challenge . . . a party may only challenge a statute to the extent the alleged basis of its infirmity is, or will be, applied to his detriment") (internal quotation and citation omitted); *State v. Hoffman*, 733 P.2d 502, 505 (Utah 1987) ("The constitutionality of a statute is considered in light of the standing of the [party] who raises the question and of its particular application in his case.").

A party whose interests are not affected by the validity of a statute may not attack that statute in the abstract. *Hoyle*, 606 P.2d at 242 ("An attack on the validity of a statute cannot be made by parties whose interests have not been, and are not about to be, prejudiced by the operation of the statute."); *State v. Burke*, 408 N.W.2d 239, 245 (Neb. 1987) ("The traditional rule is that one to whom a statute may be applied constitutionally does not have standing to challenge that statute on the ground that it conceivably may be applied unconstitutionally to others in situations not before the court"). In *Hoyle*, the Utah Supreme Court found the plaintiffs did not have standing to challenge the constitutionality of a filing fee statute because the district court found they could afford the filing fee so the statute did not operate to cause them any injury. *Hoyle*, 606 P.2d at 241-42. In *Roberts*, the plaintiff claimed a statute hindered attorneys in defending certain

criminal defendants because the attorney could be subject to civil or criminal charges for reviewing material containing child pornography. *Roberts*, 2015 UT 24, ¶¶ 44-49. The court found the plaintiff did not have standing to challenge the statute because Roberts had not shown *his* counsel was hindered in *his* representation of the plaintiff making the plaintiff's claims speculative at best. *Id.* (emphasis added).

Like the plaintiffs in *Hoyle*, Kendall cannot show any injury from the undertaking statute because he admitted he could afford the $300 minimum undertaking and Kendall was not required to pay more than the $300 undertaking. Similarly, Kendall cannot show any injury from the bond statute because the district court found Kendall was impecunious and not required to furnish a bond. Likewise, because Kendall has already filed an action asserting federal and state law claims against the City Defendants for claims arising from the search for the missing child, a declaration that the statutes are unconstitutional can redress no alleged constitutional injury. Notably, Kendall did not even attempt to argue he had traditional standing to challenge the constitutionality of the statutes when the City Defendants raised this issue in a Rule 10 Motion for Summary Disposition. (*See generally* Kendall's Opp'n to City Defs' Mot. for Summ. Disp.) Kendall simply cannot show he has traditional standing to challenge the statutes and the Court should dismiss this appeal.

B. Kendall Does Not Qualify for Alternative or Public Interest Standing.

Kendall also cannot show he meets the requirements for alternative or public interest standing.[9] Parties that lack traditional standing may pursue claims under the public interest exception to the traditional standing requirement, but that exception is narrowly applied. *Jenkins v. Swan*, 675 P.2d 1145, 1150 (Utah 1983) (stating "this Court will not readily relieve a plaintiff of the salutary requirement of showing a real and personal interest in the dispute"). To qualify for alternative standing a party must show: (1) that the issue being presented is one of sufficient public importance to balance the absence of the traditional standing criteria; and (2) that he or she is an appropriate party to bring suit. *BV Lending, LLC v. Jordanelle Special Serv. Dist*., 2013 UT App 9, ¶ 12, 294 P.3d 656, 660.

Kendall cannot satisfy the first prong of this test and show the issues raised in this appeal are of sufficient importance to waive the traditional standing criteria. An issue does not rise to the level of "sufficient public importance to balance the absence of the traditional standing criteria" simply because it challenges the constitutionality of a statute. *Gregory v. Shurtleff*, 2013 UT 18, ¶ 36, 299 P.3d 1098, 1111 ("Every constitutional provision is surely important, but not every alleged violation of a

[9] The City Defendants anticipate Kendall will request this Court permit this appeal to proceed by granting him public interest standing, even though that request was never made to the district court. In response to the City Defendants' Motion for Summary Disposition, which demonstrated Kendall did not have traditional standing to bring this appeal, Kendall argued the Court should afford him public interest standing. (*See* Kendall's Opp'n to City Defs' Mot. for Summ. Disp.) Notably, Kendall never asked the district court to invoke public interest standing, despite the fact the City Defendants argued (and the district court found) Kendall did not have traditional standing to challenge the statutes.

constitutional provision will provide a basis for public-interest standing."). Rather, to warrant waiver of the traditional standing requirements the issue raised must affect the community as a whole. *BV Lending*, 2013 UT App 9, ¶¶ 14-16.

For example, in *BV Lending*, the plaintiff sought to challenge the constitutionality of the notice requirements contained in the Utah Assessment Area Act, which did not require actual notice of an assessment be provided individually to mortgagees. *Id.*, ¶¶ 1-5. This Court found "our jurisprudence suggests that an issue of public importance is generally one where the outcome of the particular dispute at issue will itself affect the community, not one which involves only a potential impact on certain individual members of the public in the future." *Id*., ¶ 14. The court ultimately concluded that the plaintiff did not raise an issue of sufficient public importance to waive the traditional standing requirements because a failure to provide the plaintiff with actual notice of the assessment, while important, had only the potential to impact other individuals or entities similarly situated at some future time, not the public at large. *Id.*, ¶ 16.

Kendall also cannot satisfy the second prong of this test and show that he is an "appropriate party" to challenge the constitutionality of the statutes. A party is not an "appropriate party" if they lack sufficient personal interest in the injury he or she seeks to redress. *See, e.g., Packer v. Utah Attorney General's Office*, 2013 UT App 194, ¶¶ 16-20, 307 P.3d 704, 709-10 (finding plaintiff was not an "appropriate party" because he "lacked a personal interest" in the injury he sought to redress); *Jenkins*, 675 P.2d at 1150 (1983) (finding a court should consider the party's interest in the matter and "whether there is anyone who has a greater interest in the outcome of the case than the plaintiff");

BV Lending, 2013 UT App 9, ¶ 13 (noting that the district court found a party that was not obligated by statute to pay the assessment lacked "the interest necessary to effectively assist the court in developing and reviewing all relevant legal and factual questions.") (internal quotation and citation omitted). Kendall is not an appropriate party to challenge the constitutionality of the statutes because he lacks sufficient interest in the injury he seeks to redress. He was not required to post a bond and he admitted that he could afford to pay the $300 minimum undertaking. Kendall has since filed an action and is pursuing his state law claims.

Finally, a court should only grant public interest standing where the issue is unlikely to be raised, if standing is not granted. *Gregory*, 2013 UT 18, ¶ 37 (recognizing the fact that the claims are unlikely to be brought by anyone else, is "a necessary part of the showing parties must make under the public-interest standing doctrine."); *see also BV Lending*, 2013 UT App 9, ¶ 16 (denying public interest standing and noting that if the statute at issue impacted others in the future those "individuals or entities would themselves have standing to challenge the [statute]"). The issues Kendall raises in this appeal may be raised if and when they ever operate to prevent access to the courts.

III. THE BOND AND UNDERTAKING STATUTES ARE NOT FACIALLY UNCONSTITUTIONAL.

A. The Bond and Undertaking Statutes Do Not Violate the Open Courts Provision of the Utah Constitution.

The bond and undertaking statutes do not violate the open courts provision of the Utah Constitution because they do not abrogate a claim. "[T]he plain meaning of the [open courts clause]' is that it 'imposes some substantive limitation on the legislature's

ability to abolish judicial remedies in a capricious fashion." *See Tindley*, 2005 UT 30, 13 (internal quotation and citation omitted). "Although the open courts clause protects both substantive and procedural rights, the clause is not an absolute guarantee of all substantive rights." *Id.*, ¶ 17. "Rather, it applies only to legislation which abrogates a cause of action existing at the time of its enactment." *Id*. (internal quotation and citation omitted). If a statute abrogates a claim that existed at the time it was enacted, the court must engage in a *Berry* analysis. *See, e.g., Judd v. Drezga*, 2004 UT 91, ¶¶ 10-18, 103 P.3d 135, 139-141. Neither the bond statute nor the undertaking statute abrogates a claim. Furthermore, even under a *Berry* analysis both statutes pass constitutional muster.

1. The Statutes Do Not Abrogate a Claim as Demonstrated by Utah Supreme Court Precedent and the Facts of this Case.

The bond and undertaking statutes do not abrogate a claim as demonstrated by Utah Supreme Court precedent and the facts of this case. When faced with a claim that a statute violates the open courts provision, a court must determine whether the statute abrogates an existing claim. Where no claim is abrogated, no constitutional violation is shown. *See, e.g., Tindley*, 2005 UT 30, ¶¶ 12-26 (finding limitation on recoverable damages in Governmental Immunity Act did not violate open courts provision because it did not abrogate a claim that existed at the time the statute was enacted).

Whether the bond statute violates the open courts provision of the Utah Constitution was squarely addressed by the Utah Supreme Court in *Zamora v. Draper*, 635 P.2d 78, 80-82 (Utah 1981). Specifically, the Utah Supreme Court found a prior version of the bond statute was constitutional on its face. *Id.* at 80 ("it is our view that

the statute in question is not necessarily unconstitutional as applied in usual and ordinary circumstances."). It recognized that the statute could operate to restrict access if applied to an individual that was unable to afford the bond. *Id*. at 80-82. However, the court found the statute did not violate the open courts provision because "courts have the means at their command of conducting appropriate preliminary procedures" to determine whether a plaintiff is impecunious and unable to furnish a bond. *Id.* at 81. The court's decision turned on the fact that the statute contained language that stated the bond would be "in an amount fixed by the court." *Id.* at 81 ("the statute itself allows some flexibility wherein it provides that the bond shall be 'in an amount fixed by the court . . ."). The court concluded this language meant a court "may fix a bond in accordance with the plaintiff's circumstances, however impoverished he may be, and yet allow him access to the court to seek justice, as assured by Sec 11 of Article I of the State Constitution." *Id.* at 80-82. The Utah Supreme Court reaffirmed its finding three years later when the constitutionality of that statute was challenged again. *Snyder v. Cook*, 688 P.2d 496, 498 (Utah 1984).

Kendall seeks to distinguish these cases on the grounds that these decisions concern a prior version of the bond statute that Kendall claims was completely different. A comparison of the plain language of the statutes demonstrates that distinction is unavailing.[10] Both versions of the bond statute award attorney's fees to the prevailing party and require the posting of a bond to cover all attorney's fees and costs in the event

[10] Copies of Utah Code § 78-11-10 and Utah Code § 78B-3-104 are attached hereto as Aplee. Add. 0002.

the officer prevails on the state law claims. *Compare* Utah Code § 78-11-10 (requiring a bond to cover "all costs and expenses that may be awarded against such plaintiff, including a reasonable attorney's fee to be fixed by the court."); Utah Code § 78B-3-104(1)-(2) (requiring a bond to cover "all estimated costs and attorney fees the officer may be expected to incur in defending the action."). Likewise, both statutes require the court to set the amount of the bond, which was the language the court in *Zamora* found important and gave courts flexibility to determine whether the statute would be unconstitutional as applied to a particular plaintiff. *Compare* Utah Code § 78-11-10 (requiring "a written undertaking with at least two sufficient sureties in an amount to be fixed by the court"); Utah Code § 78B-3-104(1) (requiring the posting of "a bond in an amount determined by the court.").

Moreover, to the extent there is any ambiguity as to the intent of the legislature when it enacted the current version of the bond statute, the court need look no further than the statements of the bill sponsor. *See, e.g., Graves v. N. E. Servs., Inc*., 2015 UT 28, ¶ 67, 345 P.3d 619, 633-34 ("We may resolve ambiguities in the text of the law by reference to reliable indications of legislative understanding or intent (as in legislative history)"). As Kendall concedes, the bill sponsor stated the 2008 bill that enacted the current version of the bond statute was simply a recodification bill that included some "technical cleanup." (Appellant Br. 22, n.7.) Indeed, it was repeatedly stated throughout the passage of that bill that the bill did not make any substantive changes. (R. 00647, 24:15-23.) Kendall seeks to inflate the importance of the fact that the recodification bill repealed Utah Code § 78-11-10 and enacted Utah Code § 78B-3-104, but it is clear from

a comparison of the language of the two statutes that the bill did nothing more than change the numbering and formatting and modernize the language. *See supra* n.9.

The decisions in *Zamora* and *Snyder* are equally applicable to the undertaking statute. Like the bond statute, the undertaking statute provides the undertaking will be in "a sum fixed by the court." Utah Code § 63G-7-601(2). This is the language the court found important in *Zamora* and provided courts flexibility to determine whether the statute would be unconstitutional as applied to a particular plaintiff. *See Zamora*, 635 P.2d at 80-82. As demonstrated by the facts of this case, the bond and undertaking statutes do not abrogate a claim and Kendall has not shown otherwise.

2. The Bond and Undertaking Statutes Do Not Abrogate a Claim Because There was No Ability to Bring the Claims at Issue When the Statutes were Adopted.

The bond and undertaking statutes do not abrogate a claim for the additional reason that there was no ability to bring the claims at issue in this case when the statutes were adopted. The open courts clause applies when legislation abrogates a cause of action that existed at the time of its enactment." *Tindley*, 2005 UR 30, ¶¶ 17-18. "The legislature thus remains free to abrogate or limit claims that could not have been brought under then-existing law." *Id.* at ¶ 17. "Claims barred by the doctrine of governmental immunity are an example of this principle." *Id. See also, DeBry v. Noble*, 889 P.2d 428, 435 (Utah 1995) ("the scope of the protections afforded by article I, section 11 [have] to be viewed in light of the immunities that were recognized when the Utah Constitution was adopted," including "governmental immunity.").

When determining whether a statute abrogates a claim, a court looks to the law at the time of statehood. *See, e.g., Tindley,* 2005 UT 30, ¶¶ 9-26; *Ross v. Schackel*, 920 P.2d 1159, 1162-66 (Utah 1996). As set forth in *Ross*, at the time of statehood public officials were shielded by immunity if the act involved the exercise of discretion, but enjoyed no immunity for negligently performed ministerial acts. *Ross*, 920 P.2d at 1162. Ministerial acts are acts that afford the officer no discretion in how they are performed. *Id.* at 1164. An example of a ministerial act is docketing the payment of a fine. *Id.* at 1164. An example of a discretionary act is the arrest and imprisonment of an individual. *Id.* at 1163. Responding to a call regarding a missing child falls squarely within the discretionary acts of a police officer. Thus, when the bond statute was first passed in 1951, Kendall did not have a claim against police officers for the actions at issue in this case and the bond statute can abrogate no claim. *See* 1951 Ch. 58, § 1, enacting Utah Code § 104-11-16 (1951) (the first version of the bond statute).

Likewise, when the Governmental Immunity Act of Utah, which contains the undertaking requirement at issue in this case, was first passed, government entities were immune from suit for activities that qualified as governmental functions. *See Tindley*, 2005 UT 30, ¶¶ 20-26. A police response to a call regarding a missing child is clearly a governmental function for which immunity applied prior to the passage of the Governmental Immunity Act in 1965 and the undertaking requirement can abrogate no claim. The Court's open courts analysis may end here.

3. The Bond and Undertaking Statutes do not Violate the Open Courts Provision Under a *Berry* Analysis.

The Court should not engage in a *Berry* analysis because *Berry* begins with the presumption that a legal remedy was abolished. *See, e.g., Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, ¶ 15, 67 P.3d 436, 443 ("because the statute did not abrogate an existing legal remedy, and because the *Berry* test begins with the presumption that a legal remedy was abolished, the legislation satisfies the first *Berry* hurdle . . . we need not apply the second part of the *Berry* test."). Because the statutes do not abrogate a claim, a *Berry* analysis is not required. Regardless, the statutes pass constitutional muster under a *Berry* analysis.

Berry holds that a statute that abrogates a claim is acceptable if it (1) provides an injured person an effective and reasonable alternative remedy, or (2) seeks to eliminate a clear social or economic evil. *Berry By & Through Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 680 (Utah 1985). As demonstrated by the facts of this case, a plaintiff has an adequate alternative remedy as he or she may pursue federal constitutional claims without the requirement to file a bond. *See, e.g., Day v. State ex rel. Utah Dept. of Public Safety*, 1999 UT 46, ¶¶ 41-42, 980 P.2d 1171, 1185-86 (finding that the amendment to the Governmental Immunity Act of Utah to remove all claims against government employees, except for fraud and malice, provided an adequate alternative remedy because a plaintiff could bring a claim against the government entity for the acts of the employee). Indeed, DuCiv. R. 67-1(c) directs a plaintiff that wishes to file state law claims concurrent with its federal claims that it may satisfy the requirements of the bond and

undertaking statutes by filing a bond and/or an undertaking of $300 with the clerk of the court at the time the complaint is filed, which may be adjusted by the court at a later date. Finally, the bond and undertaking statutes seek to eliminate the clear social and economic evil of the filing of meritless state law claims against police officers and government entities and to ensure the ability of these defendants to collect the attorney's fees and costs they are entitled to receive should they prevail. Accordingly, even under a *Berry* analysis, the bond and undertaking statutes pass constitutional muster.

4. Kendall's Claims that the Statutes Violate the Open Courts Provision Lack Merit.

Kendall urges this Court to ignore two controlling decisions of the Utah Supreme Court and find the bond and undertaking statutes violate the open courts provision based on the decision of the Florida Supreme Court in *Psychiatric Assocs. v. Siegel*, 610 So. 2d 419 (Fla. 1992).[11] But "the meaning of our open courts clause is not dependent upon another state's interpretation of a similar provision." *Tindley*, 2005 UT 30, ¶ 16. "Rather, [Utah court's] should rely on our own state history and precedent to determine the purpose and meaning of article I, section 11's protection." *Id*. (internal quotation and citation omitted). Here, there are two Utah Supreme Court decisions that find Utah's bond statute does not violate the open courts provision of the Utah Constitution. Until and unless Kendall satisfies "the substantial burden" of convincing the Utah Supreme

[11] Notably, unlike the Utah Statute, the statute challenged in *Psychiatric Assocs.* only awarded attorney's fees to the defendant and only required the plaintiff to file a bond. *See* Utah Code § 78B-3-104 (awarding the prevailing party attorney's fees and costs and requiring a bond from the plaintiff and an official bond for the officer to cover those fees and costs).

Court that its decisions in those cases were wrong, the decisions in *Zamora* and *Snyder* are binding on this Court and the decisions from other states are unavailing. *Id.*, ¶ 14 ("Under the doctrine of stare decisis, [a party seeking to overturn a prior decision of the Utah Supreme Court] assumes the substantial burden of convincing [the Utah Supreme Court] that 'the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent.'") (internal quotation and citation omitted).[12]

The Court may also disregard Kendall's claim that the bond and undertaking statute violate the open courts provision because Utah Code § 78B-5-825 awards attorney's fees and costs to prevailing parties. The ability to collect attorney's fees and costs for the filing of a claim that lacked merit and was not brought in good faith is not relevant in determining whether a provision violates the open courts provision of the Utah Constitution.

B. The Bond and Undertaking Statutes do not Violate the Petition Clauses of the Utah and the United States Constitution.

The bond and undertaking statutes do not violate the petition clauses of the Utah and United States constitutions for the same reasons they do not violate the open courts provision. As set forth in detail above, both statutes contain language that has been interpreted by the Utah Supreme Court to give a court flexibility to waive the requirement to file a bond or an undertaking, if a plaintiff is indeed impecunious. As demonstrated by

[12] Notably, Utah is not alone in finding its bond statute constitutional. Courts from other jurisdictions have found bond statutes similar to Utah's are constitutional. *See infra* § III, C, 2.

the facts of this case, where Kendall has filed his complaint and is pursuing his state law claims, the statutes have not and do not operate to prevent a plaintiff from exercising his or her right to petition government.

C. The Bond and Undertaking Statutes do not Violate Substantive Due Process.

Kendall claims the statutes violate substantive due process because they are not reasonably related to a proper legislative purpose and are arbitrary and capricious. When undertaking a substantive due process analysis under either Article I, Section 7 of the Utah Constitution or under the Fourteenth Amendment to the United States Constitution, courts apply a rational basis test unless the governmental action implicates a fundamental right or interest. *State v. Candedo*, 2010 UT 32, ¶ 16, 232 P.3d 1008, 1013-14. The right to bring state law claims is not a fundamental right and the lower rational basis test applies.[13] *Tindley*, 2005 UT 30, ¶ 29. Under the rational basis test statutes must be upheld if they are reasonably related to a proper legislative purpose and are neither arbitrary nor discriminatory. *Id*. The statutes do not violate substantive due process

[13] Kendall's brief contains no argument that a higher standard of review applies to Kendall's due process challenge. However, Kendall's attorney communicated to counsel by email that an argument on this point was inadvertently omitted and that it would be included in Kendall's Reply brief. Kendall's counsel suggested the City Defendants may want to address this point in their Appellee brief. A party may not raise a new argument for the first time in a Reply Brief. Utah R. App. P. 24(c); ("[r]eply briefs shall be limited to answering any new matter set forth in the opposing brief"); *Brown v. Glover*, 2000 UT 89, ¶ 23, 16 P.3d 540, 545 ("issues raised by an appellant in the reply brief that were not presented in the opening brief are considered waived and will not be considered by the appellate court."). This may not be remedied by informing the City Defendants by email that the argument will be raised in the Reply Brief. The City Defendants cannot be expected to respond substantively to an argument they have not seen.

because they are reasonably related to a proper legislative purpose and are not arbitrary or discriminatory. Kendall has not shown otherwise.

1. The Statutes are Reasonably Related to a Proper Legislative Purpose.

The statutes are reasonably related to a proper legislative purpose. It is not the province of the courts to "rule on the wisdom of the [statutes at issue] or to determine whether the [statutes are] the optimal method for achieving the desired result." *Tindley*, 2005 UT 30, ¶ 32. "Rather, [the Court's] inquiry is limited to the Act's constitutionality." *Id.* Likewise, in reviewing the legitimacy of a legislative purpose, courts are not limited to considering only "those purposes that can be plainly shown to have been held by some or all legislators." *Ryan v. Gold Cross Servs., Inc*., 903 P.2d 423, 427 (Utah 1995) (internal quotation and citation omitted). "Rather, the court will sustain legislative action if it can reasonably conceive of facts which would justify the classifications made by the legislation." *Id*. ("we do not require exact proof of the legislative purposes; it is enough if a legitimate purpose can be reasonably imputed to the legislative body.").

The purpose of the bond statute was expressly recognized by the Utah Supreme Court in *Zamora*:

> [P]eace officers are in an especially hazardous calling rendering a service essential to public safety and welfare. While it is the privilege of most of us to steer clear of situations where there is violence and danger, it is the sworn duty of peace officers to go into such situations. Without extenuating thereon, this exposes them to the possibility of becoming involved therein and of incurring animosities of those engaged in such troubles, with the consequent risks of lawsuits which may emanate therefrom.

> [W]e see nothing inherently unreasonable in the legislature viewing it as within the police power of the sovereign, in the interest of maintaining the peace and good order of society, to provide this measure of protection to that class of officers who are willing to undertake that hazardous responsibility

Zamora, 635 P.2d at 80. The bond statute is an attorney's fees provision that awards fees to the prevailing party. To ensure there is an opportunity for the police officer to actually recover fees if the officer prevails on the claims, and to discourage the filing of harassing and frivolous claims, a bond is required.[14]

Like the bond statute, the undertaking statute requires a party that brings a claim against a government entity to file an undertaking of at least $300 to ensure the government entity can collect at least some of its costs, if the government entity prevails on the claims and costs are awarded. The legitimacy of that statute has also been recognized. *Hansen v. Salt Lake County*, 794 P.2d 838, 840 (Utah 1990) ("The policy of discouraging nuisance suits that supports the undertaking requirement is the same as that supporting the cost bond that can be required of nonresident plaintiffs under rule 12(j) of the Utah Rules of Civil Procedure.").

[14] This case is a classic example of the type of overzealous litigation the bond and undertaking statutes were intended to discourage. Kendall has filed a smorgasbord of state law claims against five different officers and the City for the actions of those officers. As demonstrated by the motions currently on file with the United States District Court, most (if not all) of those claims are precluded and are also duplicative of Kendall's federal and state constitutional claims. The City Attorney's Office has spent time preparing motions to dispose of those claims, when a quick review of the law demonstrates these claims fall within the parameters of the Governmental Immunity Act of Utah and are excluded by the public duty doctrine. Requiring a bond serves the purpose of requiring a plaintiff and his attorney to appropriately research claims before bringing them and ensures the party defending against such claims is able to collect, at least in part, the attorney's fees and costs they are entitled to receive by statute when they prevail on such claims.

2. Kendall has not Shown the Statutes are not Reasonably Related to a Proper Legislative Purpose or are Arbitrary or Discriminatory.

Kendall has not shown the statutes are not reasonably related to a proper legislative purpose or that they are arbitrary or discriminatory. Kendall's attempts to distinguish the Utah Supreme Court's decision in *Zamora* on the grounds it concerns a prior version of the bond statute are unavailing because the current bond statute contains the same operative provisions. *See supra* § III, A, 1. Similarly, the cases Kendall seeks to rely on are readily distinguishable because they concern bond statutes that, unlike Utah's statute, do not concern a reciprocal attorney fee provisions and do not include provisions that allow a court to set the amount of the bond commensurate with the party's ability to pay. (*See, e.g.,* Appellant Br. 34-35 citing *Psychiatric Assocs.*, 610 So. 2d at 424 (finding a Florida statute that did not contain a reciprocal attorney fee provision or the ability for the court to weigh a plaintiff's ability to post a bond violated due process); *Detraz v. Fontana*, 416 So. 2d 1291, 1292 (La. 1982) (same).)[15] The courts in those cases found those facts important in reaching the conclusion that the statutes at issue violated substantive due process.

Indeed, courts from other jurisdictions that have considered bond statutes similar to Utah's bond statute find the statutes are rationally related to a proper legislative purpose. For example in *Urrizaga v. Twin Falls County*, 106 Fed. Appx. 546, 549 (9th Cir. 2004) the court upheld Idaho's version of the bond statute that requires a plaintiff to

[15] The third case Kendall cited in an attempt to show the statutes violate substantive due process did not find the provisions at issue were unconstitutional under a due process analysis. (Appellant Br. 35, citing *Lindsey v. Normet*, 405 U.S. 56, 64-69 (1972) (concluding the challenged provisions did not violate due process).)

post a bond when bringing state law claims against a law enforcement officer. *Id.* The court found that the purpose of the statute in ensuring payment to the defendant of all costs and expenses that may be awarded, including reasonable attorney's fees, met the requirements of rationality. *Id. See also Rhodes v. Superior Court*, 90 Cal. App. 3d 484, 489 (Cal. Ct. App. 1979) (finding a statute that required plaintiffs to post a bond constitutional because the court found a reasonable interpretation of the statute was that it permitted a hearing to determine the merit of the lawsuit and to set the amount of the undertaking).

Kendall inaccurately claims the statutes result in gross injustices because claims are dismissed without being heard on the merits. When claims are dismissed for a failure to file a necessary bond or undertaking they are dismissed without prejudice. *See, e.g., Rippstein v. City of Provo*, 929 F.2d 576, 578 (10th Cir. 1991) ("the appropriate remedy for failure to make a timely filing of an undertaking under section 63–30–19[16] is dismissal without prejudice"); *Mglej v. Garfield County*, No. 2:13-CV-713, 2014 WL 2967605, at *2 (D. Utah July 1, 2014) (stating "Utah case law is clear that undertakings and bonds must be filed contemporaneously with the filing of the complaint" and that "failure to post an undertaking and bond necessitates dismissal without prejudice."). The plaintiff is free to re-file the claim with the necessary bond or undertaking at any time.

Similarly, Kendall was not required to expend significant funds and experience significant delay in the filing of his action in this case as a result of the bond and

[16] Utah Code § 63-30-19 was a prior version of Utah Code § 63G-7-601 that contained almost identical language.

undertaking statutes. Kendall was free to file claims at any time and to post the bond and undertaking as set forth in DuCiv R. 67-1(c). Instead, Kendall chose to challenge the constitutionality of the statutes.[17] Kendall and his attorney (not the City Defendants) are responsible for the funds expended in that endeavor and for any delay Kendall experienced in pursuing his state law claims against the City and its officers.

Kendall's claim that the statutes are arbitrary and capricious because a judge has unfettered discretion in setting the amount of the bond or undertaking is also unfounded. "If [an] act operates equally and affords freedom from arbitrary action it satisfies the requirements of substantive due process." *Mineer v. Bd. of Review of Indus. Comm'n*, 572 P.2d 1364, 1366 (Utah 1977). The absence of strict guidelines or standards does not make a statute or the courts exercise of discretion arbitrary or discriminatory. Indeed, permitting a court to set the amount of the bond and the undertaking is hardly unique. District courts are called on to set bond amounts when an appeal is filed. *See* Utah R. App. P. 6 (requiring the filing of a bond "in the sum of at least $300 or such greater amount as the trial court may order on motion of the appellee to ensure payment of all costs on appeal"). Likewise, courts are frequently called on to exercise discretion in determining whether a party may recover attorney's fees, the amount a party may recover in attorney's fees, and setting bail amounts.

[17] Kendall testified that he did not have collateral to post a bond because he had spent the more than $23,000 he raised on GoFundMe on attorney's fees. *See supra* 4-9, §§ B-D. A review of Kendall's attorney's fees demonstrated that by September 1, 2015 his attorney had charged him more than $21,064.00 (and billed 442 hours) to challenge the constitutionality of the bond and undertaking statutes in this action. *Id.*

Here, there are even procedural rules that provide additional guidance. As set forth in DuCiv R. 67-1(c) a party may satisfy the requirement of the bond and undertaking statutes by filing a bond and an undertaking in the amount of $300 at the time the complaint is filed. DuCiv R. 67-1(c). In the event a higher amount is requested, a court may hold a hearing to determine the merit of the request and to determine whether the plaintiff has the financial means to satisfy the request.

Finally, Kendall cites extensively to the testimony of two attorneys he called to testify at the evidentiary hearing in this matter in an attempt to support the claim that it is completely impossible to make a reasonable estimation of the time an attorney will spend on a matter. But attorneys regularly provide clients estimations to give clients an idea of the costs they will incur. Moreover, the attorneys Kendall called to testify stated they regularly accept cases on a contingency fee basis and necessarily must estimate the amount of time they will spend on a matter when they decide whether to accept a case. *See supra* 7-9, § D. The bond and undertaking statutes do not violate due process and Kendall has not shown otherwise.

D. The Bond and Undertaking Statutes do not Violate Procedural Due Process.

Kendall erroneously claims the requirement to post a bond and an undertaking at the time a complaint is filed is a taking and violates procedural due process because no hearing is required. Procedural due process requires, "at a minimum, 'timely and adequate notice and an opportunity to be heard in a meaningful way." *In re Worthen*, 926 P.2d 853, 876 (Utah 1996) (internal quotation and citation omitted). But "due process is

not a technical concept that can be reduced to a formula with a fixed content unrelated to time, place, and circumstances." *Id.* "Rather, the demands of due process rest on the concept of basic fairness of procedure and demand a procedure appropriate to the case and just to the parties involved." *Id*. (internal quotation and citation omitted). Under the due process notice requirement, "the notice must be of such nature as reasonably to convey the required information." *McBride v. Utah State Bar*, 2010 UT 60, ¶ 17, 242 P.3d 769, 775 (internal quotation and citation omitted). The statutes provide a plaintiff adequate notice of the requirement to file a bond or an undertaking. Likewise, DuCiv R. 67-1(c) provides a plaintiff notice of the procedure to follow to file the bond and undertaking in federal court.

Kendall attempts to rely on *Beaudreau v. Superior Court of Los Angelos*, 535 P.2d 713 (Cal. 1975) to show the bond and undertaking statutes violate procedural due process because they do not provide for a hearing before the payment of the bond and undertaking.[18] Kendall's reliance is misplaced because the decision in *Zamora* demonstrates the statutes provide courts the ability to conduct a hearing to set the amount of any bond or undertaking. Moreover, an evidentiary hearing is not required before every deprivation of property. *McBride*, 2010 UT 60, ¶¶ 19-29. Rather, "due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at ¶ 20 (internal quotation and citation omitted). For example, an evidentiary hearing is not required where the interests in reducing administrative burdens is high and the private

[18] Notably, the California courts later distinguished this decision when finding another bond statute constitutional. *See Rhodes*, 90 Cal. App. 3d at 487-89.

interest at issue and the risk of an erroneous deprivation of rights and the probable value of procedural safeguards is low. *McBride*, 2010 UT 60, ¶¶ 19-29.

For example, in *McBride* a plaintiff sought review of the Utah State Bar's decision to disqualify him from the bar exam for failure to upload his exam within the time frame. *Id.*, ¶¶ 1-11. The court found no procedural due process violation because the plaintiff had adequate notice of the requirement to upload the exam in the time period and an evidentiary hearing was not required before disqualifying him from the exam because the interest at stake was relatively low — he was not permanently denied the ability to practice law. *Id.*, ¶¶ 16-29. Likewise, the existence of a grievance procedure rendered the risk of erroneous deprivation and the probable value of procedural safeguards low. *Id.*, ¶¶ 16-19. Finally, the government's interest in reducing "the fiscal and administrative burdens caused by additional procedures was high." *Id.*, ¶¶ 16-29.

Here, the private interest at issue and the risk of erroneous deprivation of property is relatively low. The undertaking statute requires the payment of a deminimus sum of $300, which amount is potentially refundable. Likewise, DuCiv. R. 67-1(c) permits satisfaction of the bond requirement by filing a $300 bond. Again, this amount is potentially refundable. The administrative burden of mandating an evidentiary hearing before requiring the payment of these potentially refundable amounts is high and is not justified by any risk of an erroneous deprivation of rights because an impecunious plaintiff may file an affidavit of impecuniosity or request a hearing to avoid the requirements of the statutes, as Kendall did in this case.

E. The Bond and Undertaking Statutes do not Violate the Equal Protection of the Laws Provisions of the Utah or the United States Constitutions.

Kendall claims the statutes violate the equal protection clauses of the Utah and United States Constitutions because they discriminate against people that bring claims against police officers or government entities. When a party challenges a statute on the grounds is creates improper classification, the party must show the statute at issue creates classifications that are discriminatory. *DIRECTV v. Utah State Tax Comm'n*, 2015 UT 93, ¶ 49, 364 P.3d 1036, 1050 ("Under our governing standard, we ask (a) what classifications the statute creates, (b) whether different classes ... are treated disparately, and then (c) whether the legislature had any reasonable objective that warrants the disparity among any classifications.") (internal quotation and citation omitted). If a discriminatory classification is shown, the plaintiff must show the legislature had no reasonable objective that warrants the discriminatory classification. *Id.* The level of scrutiny applied is determined by the classification at issue. *Id.* at ¶ 50. Kendall cannot satisfy his burden because the bond and undertaking statutes do not create discriminatory classifications. Moreover, any classifications created by the statutes satisfy both the applicable rational basis level of scrutiny and the inapplicable heightened level of scrutiny.

1. <u>The Statutes do not Create Discriminatory Classifications.</u>

The statutes do not create classifications that are discriminatory. When presented with a challenge to the constitutionality of a statute under Utah's uniform operation of laws provision a court must first determine the classification that is made by the statutory

provision. *Gallivan v. Walker*, 2002 UT 89, ¶¶ 43-44, 54 P.3d 1069, 1086. The classification created by a statute "is, the class of persons to which the statutory provision applies." *Id*. Here, the bond statute applies to individuals that bring state law claims against police officers and the undertaking statute applies to individuals that bring state law claims against government entities.

A statute is not unconstitutional merely because it creates a classification of people that are subject to the statute. *Id.*, ¶ 38 (recognizing the legislature has "discretion in the creation of classes to which legislation applies"). Thus, the relevant constitutional inquiry is whether the classification created by the statute "operate[s] equally on all persons similarly situated." *Id.*, ¶ 38.

The bond and undertaking statutes operate equally on all persons similarly situated. All persons that bring state law claims against a police officer or a government entity are required to post a bond and/or an undertaking, if they have sufficient funds. *See, e.g.,* Utah Code §§ 63G-7-601; 78B-3-104. Kendall's claim that the statutes contain discriminatory classification because other plaintiffs are not subject to this requirement lacks merit. Individuals that bring state law claims against a party other than a police officer or a government entity are not similarly situated. *See, e.g., Ross*, 920 P.2d at 1166-68 (finding statute that precluded claims against prison doctors did not violate uniform operation of laws because prisoner medical patients are not similarly situated to other patients); *Bradshaw v. Wilkinson Water Co*., 2004 UT 38, ¶¶ 15-19, 94 P.3d 242, 246 (finding developer was not similarly situated to individual consumer for purpose of an equal protection challenge to water connections fees); *State v. Honie*, 2002 UT 4, ¶ 21,

57 P.3d 977, 984-85 (holding that violators of felony murder were not similarly situated to violators of aggravated murder because the elements of the crimes were different); *Roberts*, 2015 UT 24, ¶¶ 41-43 (finding classifications created by the statute constitutional because individuals that view, possess, or distribute child pornography are not similarly situated to law enforcement officers and employees of certain organizations that view, possess or distribute child pornography within the scope of their employment). The Governmental Immunity Act of Utah and Utah common law afford police officers and governmental entities defenses to state law claims that are not available to other defendants. *See* Utah Code § 63G-7-601 et. seq. Likewise, attorney's fees are generally not awarded to the prevailing party in other state law claims. Thus, parties in other state law claims are not similarly situated for purposes of an equal protection analysis.

2. Any Classifications Created By the Statutes are Subject to the Lower Rational Basis Level of Scrutiny.

To the extent the statutes create discriminatory classifications they are subject to the lower rationale basis level of scrutiny. "Most classifications are presumptively permissible and thus subject to rational basis review." *In re Adoption of J.S.*, 2014 UT 51, ¶ 68, 358 P.3d 1009, 1026. Only suspect classifications or classifications that implicate fundamental rights or rights protected by the open courts clause are reviewed under "heightened scrutiny." *Tindley*, 2005 UT 30, ¶ 28. The classification of parties involved in litigation where a police officer or a government entity is a party is not a suspect classification that is subject to heightened scrutiny.[19] *In re Adoption of J.S.*, 2014

[19] Kendall claims the statutes create at least six different classifications.

UT 51, ¶ 68 ("'suspect' classes include race, sex, and classifications implicating fundamental rights"). Likewise, the right to bring an action against a government entity or a police officer is not a fundamental right. *Tindley*, 2005 UT 30, ¶ 29 ("[t]he right to sue in tort a governmental entity engaging in a governmental function does not qualify as such a fundamental right.").

Moreover, this Court is not required to review the bond and undertaking statutes under the "heightened scrutiny" analysis simply because Kendall claims the statutes implicate rights under the open courts provision. Where it is established that the statute does not violate the open courts provision a "heightened scrutiny" analysis should not be applied. *See, e.g., Tindley*, 2005 UT 30, ¶¶ 27-30; *Ross*, 920 P.2d at 1162-68 (finding statute did not abrogate a claim and then analyzing due process and uniform operation of laws claims under a rational basis review). For example, in *Tindley* the plaintiffs challenged the constitutionality of a provision of the Governmental Immunity Act that limited the amount several plaintiffs could recover from one vehicle accident to $500,000. *Id.*, ¶¶ 2-8. The plaintiffs claimed the provision violated the open courts clause and the due process and equal protection provisions of the Utah and United States constitutions. *Id.*, ¶¶ 12-35. The court determined the provision did not violate or implicate the open courts provision because it did not abrogate a cause of action that existed at the time of its enactment. *Id.*, ¶¶ 12-26. The court then proceeded to analyze whether the statutory cap violated the uniform operation of laws provision under the

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(Appellant Br. 18-19.) However, a review of the classifications identified reveal they simply describe in different ways parties involved in litigation where a plaintiff is required to file a bond or an undertaking.

lower rational basis level of scrutiny, explicitly stating that this level of scrutiny applied because the provision did not implicate a fundamental right or a right protected by the open courts clause. *Id.*, ¶¶ 27-35. As set forth in detail above, the bond and undertaking statutes do not abrogate a claim and the statutes should be reviewed under the lower or rationale basis level of scrutiny.[20]

3. Any Classifications Created by the Statutes Satisfy the Applicable Rationale Basis Level of Scrutiny.

Any classification created by the bond and undertaking statutes are constitutionally permissible under the applicable lower or rational basis level of scrutiny. Under Utah's lower or rational basis level of scrutiny "a statute is constitutional if its classification is 'a reasonable one and bears a reasonable relationship to the achievement of a legitimate legislative purpose.'" *Tindley*, 2005 UT 30, ¶ 33. The Utah Supreme Court has recognized both statutes are reasonably related to the legitimate legislative purpose of reducing frivolous and harassing claims against police officers and government entities. *Zamora*, 635 P.2d at 80 (recognizing that because of the nature of police officer's work police officers are at a greater risk of being subject to litigation and

[20] One year prior to the decision in *Tindley*, the Utah Supreme Court issued its decision in *Judd v. Drezga*, 2004 UT 91, 103 P.3d 135. In *Judd* the court found no violation of the open courts provision because a statutory cap on damages in medical malpractice cases was justified by the legislature's attempt to elimination the clear social or economic evil of rising medical malpractice premiums and rising health care costs. *Id.*, ¶¶ 10-18. Despite finding the provision did not violate the open courts provision the court analyzed the equal protection claim under heightened scrutiny and found that it satisfied that level of scrutiny. *Id.*, ¶¶ 19-29. The court's decision in *Tindley* is more recent and should take precedent. Moreover, the facts of *Tindley* are more akin to the facts of this case because it finds a provision of the Governmental Immunity Act of Utah did not abrogate a claim. Here, the bond and undertaking statutes do not abrogate a claim and the lower rationale basis level of scrutiny applies.

that there was nothing inherently unreasonable in the legislature affording police officers extra protection from frivolous or vexatious suits); *Snyder*, 688 P.2d at 498 ("In *Zamora* this Court held that the statute requiring an undertaking was constitutional and served the public interest"); *Hansen*, 794 P.2d at 840 (recognizing the "policy of discouraging nuisance suits that supports the undertaking requirement . . ."). The statutes also serve the legitimate purpose of ensuring there are funds available for the police officer or government entity to collect in the event they prevail and attorney's fees and costs are awarded. *See Ryan*, 903 P.2d at 427 ("The court does not limit itself to considering only those purposes that can be plainly shown to have been held by some or all legislators . . . [but rather] will sustain legislative action if it can reasonably conceive of facts which would justify the classifications made by the legislation.") (internal quotation and citation omitted); *DIRECTV*, 2015 UT 93, ¶ 51 ("we have said that any rational or reasonable basis for legislative classification is sufficient, meaning that any legitimate governmental objective suffices, and any reasonable relationship between classification and purpose is adequate.") (internal quotation and citation omitted).

Kendall attempts to discredit the Utah Supreme Court's decision in *Zamora* by claiming the court did not engage in an equal protection analysis. The Court may disregard that assertion because the court in *Zamora* specifically found that it was reasonable for the legislature to provide an extra measure of protection to "that class of officers who are willing to undertake" the "hazardous responsibility" of enforcement of the laws. *Zamora*, 635 P.2d at 80. Likewise, in *Snyder*, the Utah Supreme Court again expressly rejected a claim that the bond statute violates equal protection of the laws.

Snyder, 688 P.2d at 498 ("[P]laintiffs' argument that they were denied equal protection is without merit.").

Kendall also attempts to turn the burden of proof in a rational basis review on its head. Kendall argues the bond statute does not pass constitutional muster because the City Defendants did not present empirical evidence to show that police officers are subject to a greater number of harassing and frivolous lawsuits than other individuals. (Appellant Br. 24.) But the City Defendants are not required to provide such proof. *See supra Ryan*, 903 P.2d at 427; *DIRECTV*, 2015 UT 93, ¶ 51. Exact proof of the legislative purpose is not required. *See also, Eulitt ex rel. Eulitt v. Maine Dept. of Educ*., 386 F.3d 344, 356 (1st Cir. 2004) ("Like any other challenger confronting rational basis review, [the plaintiffs] must rule out every plausible rationale that might support the law at issue . . .Under the best of circumstances, this is a steep uphill climb for a plaintiff"); *Teigen v. Renfrow*, 511 F.3d 1072, 1083 (10th Cir. 2007) ("An equal protection claim will fail if there is any reasonable conceivable state of facts that could provide a rational basis for the classification.") (internal quotation and citation omitted).

Finally, Kendall claims a decision of the Louisiana Supreme Court shows the statutes fail a rational basis review.[21] But a decision of the Louisiana Supreme Court is of little assistance where there are Utah Supreme Court cases that find the bond and undertaking statutes are reasonably related to a proper legislative purpose. Moreover, the

[21] Notably, unlike the Utah statute, the Louisiana statute at issue in that case only awarded attorney's fees to the elected official and only required the plaintiff to file a bond. *Compare Detraz*, 416 So. 2d at 1292; Utah Code § 78B-3-104 (awarding the prevailing party attorney's fees and requiring an official bond for the officer); Utah Code § 78-11-10 (same).

Louisiana court's decision turned on the fact the defendants had not produced empirical proof to support a claim that more frivolous claims were brought against public officials than other individuals, which is not required to satisfy a rational basis review under the Utah or the United States Constitutions. *See supra.* The statutes satisfy the applicable rational basis level of scrutiny and Kendall has not shown otherwise.

4. Any Classifications Created by the Statutes Also Satisfy Heightened Scrutiny.

Any classifications created by the bond and undertaking statutes also satisfy a heightened level of scrutiny. A discriminatory classification is constitutionally permissible under a heightened level of scrutiny where it "(1) is reasonable, (2) has more than a speculative tendency to further the legislative objective and, in fact, actually and substantially furthers a valid legislative purpose, and (3) is reasonably necessary to further a legitimate legislative goal." *Judd*, 2004 UT 91, ¶ 19 (internal quotation and citation omitted). In *Judd*, the Utah Supreme Court found legislation that placed a cap on the damages a plaintiff may recover in a medical malpractice action was constitutional. *Id*., ¶¶ 10-40. The court concluded the legislature's policy choice to cap damages in a medical malpractice case in an attempt to reduce medical malpractice premiums and health care costs was legitimate and that the measures were a reasonably necessary means of achieving that purpose and it actually and substantially furthered that purpose. *Id*., ¶¶ 19-29. In reaching that conclusion the court noted "we do not proceed in our analysis under article I, section 24 as if we were called upon to answer these questions in the first instance. . . . Instead, we carry out our role as the state's court of last resort, called upon

to identify the boundaries of the constitution, giving appropriate deference to the policy choices of the citizens' elected representatives." *Id*, ¶ 22.

Seventy-four new matters were asserted against Salt Lake City alone last year. Twelve of those actions named police officers. Similarly, the City closed sixteen matters that named or include claims against specific police officers in the last year, prevailing in more than half of those matters. Requiring individuals with sufficient resources to pay a bond to cover attorney's fees that a police officer is entitled to receive if he or she prevails on state law claims is a reasonably necessary means of ensuring a police officer may actually recover at least some of the attorney's fees he or she is entitled receive. Likewise, the undertaking statute is a reasonably necessary means of ensuring a government entity can collect costs should it prevail on state law claims. The provisions actually and substantially further this purpose by ensuring a fund of money that the officer or government entity can easily collect if they prevail. The statutes also serve the purpose of ensuring plaintiffs consider the merit of their state law claims and do not simply include state law claims in complaints where they are precluded by statute or common law. Requiring the furnishing of a bond or undertaking actually and substantially furthers that purpose as it makes apparent the financial consequences for filing meritless claims.[22]

[22] Kendall urges the Court to reach a contrary conclusion relying on decisions from other jurisdictions. As previously noted, the Court should rely on the jurisprudence of this state, not choice decisions from other jurisdictions. Indeed, while Kendall points to two decisions from the Arizona courts that found certain non-waivable bond requirements were not rationally related to a proper legislative purpose, a third decision from the Arizona courts found a non-waivable filing fee was reasonably related to a

IV. THE BOND AND UNDERTAKING STATUTES WERE NOT UNCONSTITUTIONALLY APPLIED TO KENDALL.

In addition to claiming the bond and undertaking statutes are facially unconstitutional, Kendall claims the statutes are unconstitutional as applied to Kendall. "In an as-applied challenge, a party concedes that the challenged statute may be facially constitutional, but argues that under the particular facts of the party's case, the statute was applied . . . in an unconstitutional manner." *Gillmor v. Summit Cty*., 2010 UT 69, ¶ 27, 246 P.3d 102, 109 (internal quotation and citation omitted). Indeed, the Utah Supreme

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proper legislative purpose. (*See* Appellant Br., *citing Eastin v. Broomfield*, 570 P.2d 744 (Ariz. 1977) and *New v. Arizona Bd. of Regents*, 618 P.2d 238 (Ariz. Ct. App. 1980).) *Cf. Tahtinen v. Superior Court of Pinal County*, 637 P.2d 723, 725-26 (1981) *cert denied* 454 U.S. 1152 (1982) (finding non-waivable filing fee reasonably related to a proper legislative purpose). Likewise, the court in *Lindsey*, recognized the legitimacy of a state's actions in requiring the posting of adequate security in an appeal from an unlawful detainer action to ensure the owner of the property could collect the damages awarded and future damages it would be entitled to if the property owner stayed in possession of the property. *Lindsey*, 405 U.S. at 77. The court only found the bond requirement at issue in that case violated equal protection because it required a plaintiff to post a bond in double the amount of damages awarded and automatically awarded the defendant double the damages actually incurred if the defendant prevailed in the appeal. *Lindsey*, 405 U.S. at 74-79. The court found no proper purpose for the automatic award of double damages. *Id.* The bond and undertaking statutes contain no such provision. As the United States Supreme Court found permissible in *Lindsey*, the requirement to post the potentially refundable bond or undertaking is purely as security for an award of attorney's fees or costs should the police officer or government entity prevail in the matter.

Finally, the decision in *Patrick v. Lynden Transp., Inc.*, 765 P.2d 1375 (Alaska 1988) is of limited assistance because Alaska applies a unique analysis when considering equal protection claims that is different from the standard applied by Utah and federal courts. *See id.* at 1377-80 (describing Alaska's "sliding scale" approach to analyzing equal protection claims and recognizing that the standard applied is greater than that required under the United States Constitution.). Moreover, the decision in *Patrick*, is contrary to Utah jurisprudence that finds a non-resident bond requirement is permissible and reasonably related to a proper legislative purpose. *Hansen*, 794 P.2d at 840 ("The policy of discouraging nuisance suits that supports the undertaking requirement is the same as that supporting the cost bond that can be required of nonresident plaintiffs under rule 12(j) of the Utah Rules of Civil Procedure.").

Court recognized that the bond statute, while facially constitutional, could be unconstitutional if applied to a plaintiff that was impecunious. *Zamora*, 635 P.2d at 80-82. The bond statute was not unconstitutionally applied to Kendall because the district court found Kendall impecunious and not required to furnish a bond. Likewise, the undertaking statute was not unconstitutionally applied to Kendall because Kendall was only required to pay a $300 undertaking that he stated he could afford. Kendall has since filed his complaint and is pursuing his state law claims.

CONCLUSION

The City Defendants respectfully requests this Court decline to hear this appeal. The issues raised are moot and Kendall does not have standing to challenge the constitutionality of the statutes. In the alternative, the City Defendants request the Court (1) affirm the district court's finding that the statutes are constitutional on their face, and (2) find that the statutes were not unconstitutionally applied to Kendall.

DATED this 25th day of May, 2016.

Attorney for Defendants/Appellees

CERTIFICATE OF COMPLIANCE

This brief, submitted under Utah Rule of Appellate Procedure 24(f)(1), complies with the type-volume limitation. The word processing system used to prepare this brief states that it contains 13,957 words and 1,119 lines in Times New Roman type, which is a proportionally spaced font.

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of May, 2016, a true and correct copy of **BRIEF OF APPELLEE SALT LAKE CITY CORPORATION** was served, via U.S. Mail, postage pre-paid, to the following:

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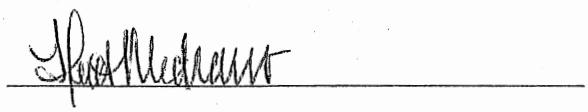

Appellees' Addendum

U.C.A. 1953 § 78-11-10

West's Utah Code Annotated Currentness
Title 78. Judicial Code
Part II. Actions, Venue, Limitation of Actions
Chapter 11. Actions—Right to Sue and Be Sued

§ 78-11-10. Actions against officers—Costs and attorneys' fees

Before any action may be filed against any sheriff, constable, peace officer, state road officer, or any other person charged with the duty of enforcement of the criminal laws of this state, or service of civil process, when such action arises out of, or in the course of the performance of his duty, or in any action upon the bond of any such officer, the proposed plaintiff, as a condition precedent thereto, shall prepare and file with, and at the time of filing the complaint in any such action, a written undertaking with at least two sufficient sureties in an amount to be fixed by the court, conditioned upon the diligent prosecution of such action, and, in the event judgment in the said cause shall be against the plaintiff, for the payment to the defendant of all costs and expenses that may be awarded against such plaintiff, including a reasonable attorney's fee to be fixed by the court. In any such action, the prevailing party therein shall, in addition to an award of costs as otherwise provided, recover from the losing party therein such sum as counsel fees as shall be allowed by the court. The official bond of any such officer shall be liable for any such costs and attorney fees.

Laws 1951, c. 58, § 1.

Current through 2007 General Legislative Session.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Utah Code Annotated
Title 78b. Judicial Code
Chapter 3. Actions and Venue
Part 1. Actions--Right to Sue and be Sued

U.C.A. 1953 § 78B-3-104

§ 78B-3-104. Actions against officers--Bond required--Costs and attorney fees

Currentness

(1) A person may not file an action against a law enforcement officer acting within the scope of the officer's official duties unless the person has posted a bond in an amount determined by the court.

(2) The bond shall cover all estimated costs and attorney fees the officer may be expected to incur in defending the action, in the event the officer prevails.

(3) The prevailing party shall recover from the losing party all costs and attorney fees allowed by the court.

(4) In the event the plaintiff prevails, the official bond of the officer shall be liable for the plaintiff's costs and attorney fees.

Credits

Laws 2008, c. 3, § 680, eff. Feb. 7, 2008.

U.C.A. 1953 § 78B-3-104, UT ST § 78B-3-104
Current through 2015 First Special Session

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